

# The Burger Court Opinion Writing Database

*Swarb v. Lennox*

405 U.S. 191 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 18, 1972

Re: No. 70-6 - Swarb v. Lennox

Dear Harry:

Please join me.

Regards,

LOSB

Mr. Justice Blackmun

cc: The Conference

3  
/

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-6

Nellie Swarb et al.,  
Appellants,  
v.  
William M. Lennox  
et al.

On Appeal from the United States  
District Court for the Eastern  
District of Pennsylvania.

[February —, 1972]

Memorandum from MR. JUSTICE DOUGLAS.

Pennsylvania permits creditors to extract from debtors their consent to a confession of judgment procedure which, while not rendering debtors completely defenseless, deprives them of many of the safeguards of ordinary civil procedure. A group of low income plaintiffs asked the three-judge court below to enjoin the further operation of this scheme on the ground that debtors who consented to this abbreviated form of justice did so unwittingly or did so out of compulsion supplied by standard form of adhesion contracts. The District Court granted limited relief, holding that the scheme worked a denial of procedural due process only when applied to individual debtors who earned less than \$10,000 annually and who entered into nonmortgage credit transactions, except where it is shown prior to judgment that their waivers had been knowing and voluntary. The plaintiffs have appealed, arguing that the lower court should have invalidated the regime on its face and that, in any event, class relief was wrongly denied both to persons earning more than \$10,000 yearly and to home mortgagors.

The Commonwealth did not cross-appeal but instead now confesses that the scheme is unconstitutional and

Mr. Chief Justice  
Mr. Justice Blackman  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

Douglas, J.

2/2/72

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

4, 5  
2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-6

Circulated: \_\_\_\_\_

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Nellie Swarb et al.,  
Appellants.  
v.  
William M. Lennox  
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On Appeal from the United States  
District Court for the Eastern  
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[February —, 1972]

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 3, 1972

No 70-6

Dear Bill:

If you haven't already seen it, you may be interested in No. 71-801 - Alameda v. California Welfare Rights Organization, an appeal on List 7, sheet 1 of the February 18 Cert List. The California Supreme Court handled a problem like that in Swarb v. Lennox - how to deal with an adverse judgment against a state official from which that official takes no appeal but which is attacked by an organization "aggrieved", as the finance companies amicus curiae claimed in Swarb was their position.

Sincerely,

Bul

Mr. Justice Douglas

CASE # 70-6 Wm Douglas  
Oct 71 term

B  
M

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 17, 1972

RE: No. 70-6 - Swarb v. Lennox

Dear Harry:

I agree.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Harry:  
Please join me

g —  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 3, 1972

70-6 - Swarb v. Lennox

Dear Harry,

In view of the odd posture of this case, I think your proposed disposition is as good as any, and I am glad to join it.

Sincerely yours,

P.S.  
1.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

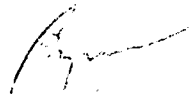
February 3, 1972

Re: No. 70-6 - SWARB v. LENNOX

Dear Harry:

I agree with your memorandum  
in this case.

Sincerely,



Mr. Justice Blackmun

Copies to Conference



2  
14

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 2-16-72

No. 70-6

Recirculated: \_\_\_\_\_

Nellie Swarb et al.,  
Appellants,  
v.  
William M. Lennox  
et al. } On Appeal from the United States  
District Court for the Eastern  
District of Pennsylvania.

[February —, 1972]

MR. JUSTICE WHITE.

I join in the opinion of the Court and add these comments about a narrow aspect of the case.

It is true that this Court has no jurisdiction of that portion of the District Court's judgment from which no appeal or cross-appeal was taken. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U. S. 191-192 (1937); cf. *United States v. Raines*, 362 U. S. 17, 27 n. 7 (1960). But it is also well established that the prevailing party below need not cross-appeal to entitle him to support the judgment in his favor on grounds expressly rejected by the court below. *Walling v. General Industries Co.*, 330 U. S. 545 (1947); *Langnes v. Green*, 282 U. S. 531, 534-539 (1931); *United States v. American Railway Express Co.*, 265 U. S. 425, 435-436 (1924); and the Court may notice a plain error in the record which disposes of a judgment before it. *Id.*, *Reynolds v. United States*, 98 U. S. 145, 168-169 (1878). Thus, despite the fact that appellee-intervenors did not cross-appeal, they were free to support that part of the judgment in their favor on grounds that were presented and rejected by the District Court in arriving at an adverse judgment on other aspects of the case. Those grounds, if sustained,

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 17, 1972

Re: No. 70-6 - Swarb v. Lennox

Dear Harry:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 1, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-6 - Swarb v. Lennox

I have overworked this. I felt, however, that it was advisable to spell out the Pennsylvania system with all its rigidity and pervasiveness. Perhaps I go too far. You may not approve of my closing caveats.

H. A. B.

To: The Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall ✓  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES Blackmun, J.

No. 70-6

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Nellie Swarb et al.,  
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 et al. } On Appeal from the United States  
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[February —, 1972]

Memorandum by MR. JUSTICE BLACKMUN.

This appeal, heard as a companion to *D. H. Overmyer Co. v. Frick Co.*, ante, p. —, decided today, also purports to raise for the Court the issue of the due process validity of cognovit provisions. The system under challenge in this case is that of Pennsylvania.<sup>1</sup> The three-judge District Court, with one judge dissenting in part because, in his view, the court did not go far enough, refrained from declaring the Commonwealth's rules and statutes unconstitutional on their face and granted declaratory and injunctive relief only for a limited class of cognovit signers. 314 F. Supp. 1091 (ED Pa. 1970). The plaintiffs, but not the defendants, appealed. We noted probable jurisdiction the same day certiorari was granted in *Overmyer*. 401 U. S. 991.

<sup>1</sup> Pa. Rules Civ. Proc. 2950-2976, effective January 1, 1970 (which, by the Act of June 21, 1937, P. L. 1982, have the effect of state statutes): Act of April 14, 1834, P. L. 333, § 77, 17 P. S. § 1482 III; Act of February 24, 1806, P. L. 334, 4 Sm. L. 270, § 28, 12 P. S. § 739; Act of March 21, 1806, P. L. 558, 4 Sm. L. 326, § 8, 12 P. S. § 738. By Rule 2976, 12 P. S. § 739 is suspended "only insofar as it may be inconsistent with these rules," and 12 P. S. § 738 is suspended in its application to actions to confess judgment for money or for possession of real property.